

5059. Adulteration of pork and beans. U. S. * * * v. 735 Cases of Pork and Beans. * * * 350 Cases of Pork and Beans. * * * 144 Cases of Pork and Beans. * * * 138 Cases of Pork and Beans. Tried to the court and a jury. Verdict in favor of Government. Judgment of condemnation and forfeiture. Product ordered released on bond. (F. & D. Nos. 7330, 7337, 7340, 7371. I. S. Nos. 10139-1, 11555-1, 11556-1, 12240-1, 12441-1, 12442-1, 12443-1, 12445-1, 12449-1, 12453-1. S. Nos. C-471, C-475, C-478, C-480, C-482, C-485, C-487, C-506.

On April 19, 1916, April 21, 1916, April 29, 1916, and May 6, 1916, the United States attorney for the Western District of Michigan, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying for the seizure and condemnation of 735 cases, 350 cases, 144 cases, and 138 cases of pork and beans, remaining unsold in the original unbroken packages at Shelby, Mich., and which had been shipped during the months of January and February, 1916, by the Oceana Canning Co., Shelby, Mich., and transported from the State of Michigan to various places in the States of Illinois and Missouri, and were reshipped to said company at Shelby, Mich., during the month of April, 1916, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article in each shipment was alleged, in substance, in the libels for the reason that it consisted, in whole or in part, of a filthy and decomposed vegetable substance.

On June 6, 1916, the Oceana Canning Co., a corporation, Shelby, Mich., filed its answer denying the allegations of the libel. On October 31, 1916, the case having come on for trial before the court and a jury, after submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Sessions, *D. J.*):

Gentlemen of the jury, at the outset you should disabuse your minds of any feeling or belief that by this suit the Government is making an attack upon the bean industry or the canning industry of this state. An impression seems to have been sought to be created that in this proceeding the Government is attacking one of the important industries and businesses of this state. That is not true in any sense or to any degree, and the verdict and judgment in this case, whatever they may be, will not in anywise affect the business of the bean grower, the bean dealer or the bean packer, and will not in anywise affect the industry or product of any other canning concern than the claimant, the Oceana Canning Company, and will not affect its industry in any way except as to the canned pork and beans involved in these particular shipments. No claim is made and no charge is made by the Government that the processes employed in canning pork and beans are defective, or that there is anything wrong with them.

The specific claim that is made by the Government in this case is that in the packing and canning of the particular pork and beans involved in this controversy beans of an inferior and defective grade, or of an inferior and defective stock, were obtained and used, and that the beans were so inferior and so defective that they were partly decomposed and rotten and came within the ban of the Act of Congress known as the Food & Drugs Act, the purpose of which was and is to protect the public against deception, imposition and injury with relation to foods and drugs. That is the issue and the only issue in this case.

Congress in its wisdom has seen fit to prohibit the transportation in interstate commerce (that is, from one state to another) of adulterated foods, and Congress has declared in unequivocal and unambiguous terms what shall constitute adulterated foods. Congress has seen fit to enact that adulterated food shall not be permitted to go into the channels of interstate commerce; that it shall be forfeited and condemned and, so far as the Government can prevent, shall not be permitted to be consumed by the public.

In this consolidated case—and it is four suits consolidated into one and treated as one suit—the Government seeks to condemn and forfeit 1169 cases and 58 cans of pork and beans which were manufactured or canned by the Claimant, the Oceana Canning Company, at Shelby, Michigan, and which were

transported in interstate commerce; and its right to forfeit and condemn the product involved in this controversy is based upon the claim that these cans of pork and beans consisted in whole or in part of decomposed vegetable substances, or a decomposed vegetable substance.

This is not a criminal case. The Government does not seek the conviction and punishment of any person or corporation for the commission of a criminal offense; and therefore, the rules of evidence applicable to criminal trials do not prevail in this proceeding. As you all know, in a criminal case the Government, or the people, must establish a case beyond a reasonable doubt to warrant a conviction. That is not true in this case, because it is not a criminal suit. This is a civil suit, but it is of an unusual nature, in that the Government does not here seek to recover a money judgment or to recover property for itself. It does seek to condemn and forfeit certain articles of food which it claims are within the prohibition of the Act of Congress known as the Food & Drugs Act. So that in this case the Government is not required to establish its cause of action by evidence which satisfies you of its right to recover beyond a reasonable doubt. It is necessary, to warrant a verdict in favor of the Government that it shall have established its case and each and every essential element thereof by a fair preponderance of the evidence, and by evidence which is clear and satisfactory and convincing to you. No greater burden than that rests upon the Government. To warrant a verdict in its favor the Government must have so established,—

First, that the article sought to be condemned is a food or a food product;

Second, that it has been transported in interstate commerce, that is from one state to another;

Third, that at the time of its seizure, having been transported, it was still in the unbroken or original package, or unloaded; and,

Fourth, that at the time of the shipment and seizure the article was adulterated within the meaning and purview of the Act of Congress here under consideration.

The first three elements of the Government's cause of action are established by the evidence in the case. It does appear by the undisputed evidence that canned pork and beans are articles of food. It does appear by the undisputed evidence that the cans of pork and beans, or cases of pork and beans involved in this controversy have been transported in interstate commerce. It does appear that at the time of their seizure by the Government they were still unloaded or in the original and unbroken packages.

So that the sole question for your determination is whether, within the meaning and purview of the Food & Drugs Act of Congress, these cans of pork and beans were adulterated.

Something has been said with relation to the pork and beans in controversy being unfit for food, or deleterious to health if consumed by human beings. Those are questions with which you have no concern; those are questions which are not involved in this controversy, and they are matters which do not constitute an element of the Government's cause of action which it is required to establish.

Again, Congress in its wisdom and in its discretion and in the exercise of its power has declared the rule and the standard in those regards. In certain sections of the Food & Drugs Act, Congress has seen fit to provide that before the Government will be entitled to condemn or forfeit the article under consideration and in controversy it must establish that the article is deleterious to health. The term "unfit for food" is not used in the Statute; but in the section and provision of the Statute here involved Congress has declared what the rule shall be, and has not limited or restricted the right of condemnation and confiscation to such articles of food as are found to be adulterated to an extent to render them deleterious to health. In other words, as I have said, Congress has made the rule and established the standard and has declared that any article of food which consists in whole or in part of a decomposed vegetable substance shall be deemed adulterated and shall not be permitted to go into the channels of interstate commerce. Thus the issue is narrowed to the one question: Did the cans of pork and beans involved in this controversy, and which have been seized by the Government, at the time of their seizure, consist in whole or in part of a decomposed vegetable substance?

The term "decomposed" as it appears in this Act of Congress is not confined to its technical or scientific definition. Strictly speaking, or scientifically speaking, an article may be said to be decomposed when it is broken down, when it is separated into its constituent elements; but as the term is here used that is

rot the final test. If it were, foods which are produced by the decomposition of some other food substance would be within the ban of the statute. To illustrate, I think we all know, as a matter of common knowledge, that sauer kraut is produced and manufactured partially by the decomposition of cabbage, and yet sauer kraut is a food and it is not decomposed so as to be within the prohibition of this Statute, or the meaning of the term as it is used in this Statute. In the same way butter, and cheese, and buttermilk result from the decomposition of milk, and yet they are not decomposed or adulterated articles of food. So that there must be some other or some additional meaning of this term "decomposed," as it is used in this Act of Congress; and it means decayed, or rotten as these terms are commonly and ordinarily understood. I think nothing can be added to that definition that would be of aid or assistance to the jury. You all know what is commonly meant by a decayed or rotten vegetable substance.

It has been said in the course of the argument that that being true there was no necessity for the testimony of experts and scientists in this case. That conclusion does not follow at all from the premise. The testimony of the experts and the scientists who have testified in this case is of great importance to you in determining the question which is presented to you for your determination. I think I may safely say that we all know a rotten apple, or a partially rotten apple, when we see it, if it has decayed and become rotten to such an extent that the decay or rot is visible or can be detected by the senses. But I doubt if any one of your number would be able to tell or define what produced the rot in the apple, or the kind of rot that existed in the apple, or what its effect might be upon another vegetable; I doubt if any one of you could tell what it consisted of, or whether it was a mold or a fungus growth. Those matters are not within our ordinary experience, and it becomes important for us to learn from those who are versed in such matters what the cause of the rot is, what produces it, and then applying the information so obtained to this particular case it enables us, and will enable you, to determine whether the beans contained in the cans of pork and beans involved in this controversy were decayed or rotten or partially so. So that in determining the question presented to you it will be your duty carefully to consider all of the testimony and all of the evidence in this case, that on the part of experts as well as that on the part of non-experts.

Something has been said in this case as to there being a difference between dry rot and wet rot. The Statute does not recognize any such difference. You have all in your experience and in your observation seen and found rot that was not a so-called wet rot, and yet it may have been rot. While I am not an expert, I presume to say that the question of whether a rot is a dry rot or a wet rot depends pretty largely upon the nature of the substance upon which it is acting. We have all of us seen rotten wood, which was not a wet rot; nevertheless it was a true rot and we could all tell it if we saw it. We have all of us seen both dry and wet rots in vegetables of different kinds. So that the test in this case is not whether this was a dry rot or a wet rot which affected these beans, nor is the test whether the rot was active or inactive at the time of the seizure of the beans. The test is, was a part of the substance of which those cans of pork and beans consisted rotten or decayed at that time; not whether it was wet or dry, or active or inactive, but under the testimony in the case it is for you to determine whether a part of the beans in those cans were decomposed or partially decomposed, and whether the cans of pork and beans consisted partially of decomposed beans.

Some other terms used in this Statute ought to be defined. The term "consists of" is employed. That term means something more than the word "contains." The term "contains" ordinarily means something added to or embraced within the original substance. The term "consists of" as here employed means, a part of or a constituent element of the product; in other words, there must be something more than a trace of rottenness in these beans. There must be such an amount or such a degree of rottenness in the beans as to be definable, measurable, and appreciable. It need not be of any particular degree, but it must be something that can be found substantially in the article of food under consideration.

At the risk of inaccuracy and mistake as to details, but for the purpose of aiding you if I can to a correct conclusion in this case, I will try and give you some illustrations of the effect of this statute as regards the transportation in interstate commerce of adulterated foods. A carload of potatoes is shipped in interstate commerce; a few of the potatoes in that carload are rotten. You would at once say that the Government would not be justified in condemning

that whole carload of potatoes because a few of the potatoes therein were decomposed and rotten; because decomposition, to some extent, is going on all the time in a vegetable of that kind after it has ceased to grow. Why may it be true that a carload of potatoes containing a few rotten potatoes is not subject to forfeiture and condemnation? As I view the law this is the reason and the foundation for it: In that instance each potato is a unit, and each potato is treated by itself before it is used or consumed as an article of food, and each potato must be so treated, that is, by itself, before it is consumed. But suppose that that carload of potatoes as a whole, the good and the bad and the sound and the rotten, was converted into potato flour, and there was in the potato flour made from that carload of potatoes an appreciable and definable and substantial amount of rotten potatoes, that flour would be subject to condemnation and forfeiture. And why? Because the rotten substance therein, or the decayed substance therein is not capable of separation from the rest of the mass and it is all to be consumed by the consumer. I am simply giving you this as a rough illustration. In the same way a barrel of apples containing a few rotten apples might not be subject to condemnation, at least we have not that question here before us for determination. But suppose that the entire barrel of apples, the sound and the rotten, were converted into apple sauce, or apple butter, or apple jelly, and the rotten substance derived from the rotten apples in that apple sauce, and apple butter, and apple jelly, was an appreciable, measurable and definable amount, then that food product would be subject to condemnation and forfeiture if it was transported in interstate commerce.

The same way with tomatoes. A crate of tomatoes containing a few rotten tomatoes might not be subject to condemnation and forfeiture; but if those tomatoes, the rotten and the sound, the good and the bad, were manufactured into tomato pulp or tomato catsup, then the rotten substance therein could not be separated from the sound, from the wholesome; the unadulterated could not be separated from the adulterated, and the whole mass would become adulterated and liable to confiscation if shipped in interstate commerce. To go a step further, if you had a carload, we will say, of ears of corn and some of the ears of corn to an amount that would be definable and appreciable and measurable were rotten and decayed, the Government might not have the right to condemn that whole carload of corn—I do not say that it would not, but at least it might not; but certainly if that corn was shelled and the whole carload of corn, including the rotten and the sound, was converted into cornmeal for human consumption and then shipped in interstate commerce it would be liable to condemnation. And to bring the illustration to this case: Field beans as they come from the field, some of them discolored—if decomposed, and that is the question for you to determine—in the dry state might not be subject to confiscation or condemnation if shipped by the farmer or the warehouseman in interstate commerce, for the reason that it appears by the evidence in this case that those beans are treated, they are picked in order to separate the discolored beans from the white beans, and we all know, as a matter of common knowledge, that whether beans have been hand-picked or mechanically picked, when they come to the housewife and the cook they are picked over before they are cooked and placed upon the table for consumption. For that reason and because the good may be separated from the bad, it may be that beans that are field run or cull beans, designed to be used as a food product, may not be subject to condemnation in the dry state. But when those beans are canned, processed, and if those discolored beans are decayed or rotten,—and as I have said that is the question for you to determine—if they are decomposed within the meaning of this statute, then the can of beans becomes the unit, and in the ordinary course of consumption the discolored beans are not separated from the white beans and the whole mass is consumed, the discolored with the others. So that if discolored beans are decomposed within the meaning of this statute, then such a can of beans transported in interstate commerce comes within the ban of this statute.

It is not necessary for the Government to show that there were any beans in any of these cans which were wholly decomposed or rotten, because if a bean is partly decomposed and partly rotten, that rotten part which goes into the can is a decomposed substance just as much as the whole bean would be if entirely discolored. I do not mean that it would be the same quantity, but the decomposed part would still be decomposed, notwithstanding that it did not affect the entire bean.

So that the issue is a narrow one. It is for you to say from the evidence in this case: Did these cans of pork and beans as they were canned, as they were

shipped in interstate commerce, as they were seized by the Government, consist in part of a decomposed vegetable substance? In other words, were the beans, some of them, contained in these cans of pork and beans, partly rotten or decayed? That is the question for you to determine. If you find from the evidence in the case that these cans of pork and beans consisted in part of a decomposed vegetable substance, your verdict will be in favor of the Government. If you find that they did not your verdict will be in favor of the Claimant.

In form your verdict will be, if you find for the Government: We find for the Government and that the canned pork and beans ought to be condemned. If you find for the Claimant: We find for the Claimant and that the canned pork and beans ought not to be condemned.

Mr. Clerk, you may swear an officer.

Mr. MASTER. We desire to except to the charge of the Court which eliminates the elements of unfitness for food and deleteriousness to health as not constituting an element of the issue in this case. Also, on account thereof, that the issue is narrowed to one question.

We desire to except to the illustrations given relative to the potatoes in the car of potatoes; the apples and apple jelly; tomatoes and tomato catsup, as being within the ban of the Statute, when there is no reference to unfitness for food or deleteriousness to health.

We desire to except to the refusal of the Court to charge as asked for by Claimant in its additional requests to charge and numbered 1 to 12 inclusive.

We desire to except to that portion of the charge which states that the decomposition involved did not depend on whether the rot was active or inactive.

Mr. WALKER. I don't know whether I ought to take any exceptions at all; it would be simply to the failure to give the Government's requests to charge as preferred, 1, 2, and 3. The other three were covered by the general charge, and I think perhaps these were.

The jury then retired and after due deliberation returned a verdict for the Government, finding the product adulterated as alleged, and thereupon a formal decree of condemnation and forfeiture was entered November 8, 1916, and thereafter, on February 2, 1917, it was ordered by the court that the product should be released to said claimant upon the payment of the costs of the proceedings, amounting to \$875.37, and the execution of a bond in the sum of \$3,000, in conformity with section 10 of the act.

CLARENCE OUSLEY, *Acting Secretary of Agriculture.*